No. 92252

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IN THE
MISSOURI SUPREME COURT

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STATE OF MISSOURI,

Respondent,

v.

ELTON NORFOLK,

Appellant.

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Appeal to the Supreme Court of Missouri
from the Circuit Court of the City of St. Louis, Missouri
Twenty-Second Judicial Circuit, Division 20
The Honorable Donald L. McCullin, Judge

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# APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

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Respectfully submitted,

Timothy Forneris
Assistant Public Defender
Office of the Missouri Public Defender
1010 Market Street, Suite 1100
St. Louis, MO 63101
(314) 340-7662 (Phone)
(314) 340-7685 (Fax)
Tim.Forneris@mspd.mo.gov

*Attorney for Appellant*

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## Jurisdictional Statement

In the Circuit Court of St. Louis City, Cause No. 0922-CR04196-01, the State of Missouri charged that Appellant Elton Norfolk committed one count of the class D felony of unlawful use of a weapon in violation of Section 571.030, one count of the class A misdemeanor of possession of marijuana in violation of Section 195.202, and one count of the class A misdemeanor of assault on a law enforcement officer in violation of Section 565.083.[1]

On August 4, 2010, the Honorable Donald L. McCullin presided over the bench trial against Appellant on the charged offenses. The court found Appellant guilty of the unlawful use of a weapon and possession counts, but acquitted him of the assault on a law enforcement officer charge. On August 27, 2010, Judge McCullin sentenced Appellant to three years. Appellant timely filed his notice of appeal on August 31, 2010.

On November 15, 2011, the Court of Appeals issued its opinion affirming Appellant's convictions. This Court transferred the case on January 31, 2012 upon application by Appellant. Jurisdiction lies in the Supreme Court of Missouri. Mo. Const., Art. V, Sec. 10; Rule 83.02.

[1] All statutory references are to RSMo 2000 unless otherwise indicated. Appellant will cite to the record on appeal as follows: Legal File, "(L.F.)," Transcript, "(Tr.)," and Appendix "(A)."

## Statement of Facts

Around 9:00 p.m., Appellant was standing by himself on the corner of Lexington Avenue and Vandeventer Avenue (Tr. 22-23). Nothing was bulging from his clothes (Tr. 22). Appellant was not doing anything illegal (Tr. 22).

Officer Julie Reynolds was patrolling the area because there had been some recent robberies (Tr. 3, 22). She was in a marked patrol car (Tr. 3). Appellant, who was standing on the corner, drew her attention (Tr. 22-23). They made eye contact (Tr. 3). Officer Reynolds had never heard any specific complaints about Appellant or about anyone that looked like him (Tr. 3, 22). Officer Reynolds also did not see a weapon on Appellant (Tr. 129-130).

Appellant pulled up his pants in a manner that Officer Reynolds believed he was concealing a weapon (Tr. 3, 23). Officer Reynolds never saw Appellant clutch an object when he pulled up his pants (Tr. 3, 23). But Officer Reynolds believed that Appellant had a weapon (Tr. 3, 23).

Officer Reynolds parked and exited her patrol car (Tr. 4, 23). Appellant went into "A & D" Mini Market (Tr. 5, 23). She followed Appellant into the store (Tr. 5, 23).

Officer Reynolds asked Appellant if he would come outside the store and talk with her (Tr. 5). Appellant said, "Fuck you, I don't need to talk to you." (Tr. 5). Officer Reynolds responded, "If you're doing anything wrong, then you'll come outside and you'll speak with me" (Tr. 5).

Appellant walked out of the store (Tr. 5-6, 23). Officer Reynolds asked him to turn around and put his hands against the wall so that she could check him for weapons (Tr. 6, 23). After Appellant put his hands in the air, Officer Reynolds saw a butt of a gun as she patted him down (Tr. 6, 23). Appellant pushed away from her and she pulled out her gun (Tr. 24). Officer Reynolds put her hand on the back of his head against the wall and called for assistance (Tr. 24). Officer Carey Venice arrived and handcuffed Appellant (Tr. 25).

The State charged Appellant with one count of unlawful use of a weapon, one count of possession of marijuana, and one count of assault on a law enforcement officer (L.F. 14-15). On August 4, 2010, the Honorable Donald L. McCullin presided over the bench trial against Appellant on the charged offenses (Tr. 1). On March 9, 2010, Appellant filed a motion to suppress evidence and a hearing was held (L.F. 23-27; Tr. 1-19). Both sides argued to the court and the trial court denied the defense's motion to suppress (Tr. 15-19).

The trial court found Appellant guilty of the unlawful use of a weapon and possession counts, but acquitted him of the assault on a law enforcement officer charge (Tr. 59). The trial court sentenced Appellant to three years (Tr. 60-61; L.F. 35-38; A1-A4). Appellant timely filed his notice of appeal on August 31, 2010 (L.F. 40-43). This appeal follows.

To avoid repetition, further facts may be set forth in the Argument portion of this brief.

## Point Relied On - I

**The trial court clearly erred in overruling Appellant's motion to suppress evidence and in overruling Appellant's objections to (a) the admission of State's Exhibit 2, the gun, State's Exhibit 3, the magazine from inside the handgun, State's Exhibit 4, cartridges, and State's Exhibit 7, the marijuana, and (b) Officer Reynolds' testimony relating to the seizure of the said evidence because the evidence was obtained as the result of an unlawful search and seizure, in that Officer Reynolds lacked reasonable suspicion under Terry v. Ohio to detain Appellant. Appellant pulling up his pants was insufficient to provide reasonable suspicion for Appellant's stop because the officers never saw a weapon and had no reason to believe that Appellant was engaged in criminal activity at the time Officer Reynolds stopped Appellant. The court should have suppressed Officer Reynolds' testimony about the seizure and the evidence seized as fruit of the poisonous tree. The court's error deprived Appellant of his rights to be free from unreasonable searches and seizures, to due process of law, and to a fair trial as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 15 of the Missouri Constitution.**

Fahy v. Connecticut, 375 U.S. 85 (1963);

Terry v. Ohio, 392 U.S. 1 (1968);

United States v. Jones, 606 F.3d 964 (8th Cir. 2010);

U.S. Const., Amends. IV, V, and XIV; and,

Mo. Const., Art. I, Sections 10 and 15.

## Argument - I

**The trial court clearly erred in overruling Appellant's motion to suppress evidence and in overruling Appellant's objections to (a) the admission of State's Exhibit 2, the gun, State's Exhibit 3, the magazine from inside the handgun, State's Exhibit 4, cartridges, and State's Exhibit 7, the marijuana, and (b) Officer Reynolds' testimony relating to the seizure of the said evidence because the evidence was obtained as the result of an unlawful search and seizure, in that Officer Reynolds lacked reasonable suspicion under Terry v. Ohio to detain Appellant. Appellant pulling up his pants was insufficient to provide reasonable suspicion for Appellant's stop because the officers never saw a weapon and had no reason to believe that Appellant was engaged in criminal activity at the time Officer Reynolds stopped Appellant. The court should have suppressed Officer Reynolds' testimony about the seizure and the evidence seized as fruit of the poisonous tree. The court's error deprived Appellant of his rights to be free from unreasonable searches and seizures, to due process of law, and to a fair trial as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 15 of the Missouri Constitution.**

## Summary of Argument

Without seeing a weapon or a bulge in his t-shirt and jeans, Officer Reynolds arrested Appellant for pulling up his pants. The trial court erred in finding the search and seizure was legal because Appellant was stopped on

suspicion of carrying a weapon. First, this was a seizure because Appellant was not free to leave after Officer Reynolds ordered Appellant out of the store and to put his hands on the wall outside the store so he could not leave. Second, there was no reasonable suspicion to stop Appellant because the calls about the robberies did not implicate him. Finally, Appellant did nothing illegal or suspicious by pulling up his pants while standing on a street corner.

**Preservation of Error**

On March 9, 2010, Appellant filed a motion to suppress evidence and a hearing was held (L.F. 23-27; Tr. 1-19). During the suppression hearing, Officer Reynolds testified about arresting Appellant (Tr. 2-14). After the hearing, the trial court denied Appellant's motion to suppress (Tr. 19).

At Appellant's bench trial, defense counsel made timely objections to the admission of testimony and evidence on the grounds in Appellant's motion to suppress (Tr. 26, 27, 29-30). The trial court overruled defense counsel's objection (Tr. 26, 27, 29-30).

For appellate review of cases tried without a jury, a motion for new trial is not necessary to preserve any matter for appellate review. Rule 29.11(e)(2). Missouri Courts have held that a motion for new trial is not necessary to secure review of a judgment of conviction and sentence in a bench-tried criminal case. State v. Brown, 332 S.W.3d 282, 285 (Mo. App. S.D. 2011).

## Standard of Review

In reviewing the trial court's ruling on a motion to suppress, the appellate court considers all evidence and reasonable inferences in the light most favorable to the ruling and defers to the trial court's credibility determinations. State v. Granado, 148 S.W.3d 309, 311 (Mo. banc 2004). The trial court's ruling will be reversed only if it is clearly erroneous. Id. A ruling is deemed clearly erroneous if the appellate court is left with a definite and firm belief that a mistake was made. State v. Cook, 273 S.W.3d 562, 567 (Mo. App. E.D. 2008). Where there is no dispute regarding the facts, the question of whether the police conduct violates the Fourth Amendment is one of law that is reviewed *de novo*. State v. J.D.L.C., 293 S.W.3d 85, 88 (Mo. App. W.D. 2009).

## Analysis

Appellant was standing by himself on the corner of Lexington Avenue and Vandeventer Avenue (Tr. 22-23). Nothing was bulging from his clothes (Tr. 22). Appellant was not doing anything illegal or suspicious (Tr. 22).

Officer Reynolds seized Appellant after she ordered him to leave the store and put his hands in the air (Tr. 5-6, 23). Officer Reynolds never saw a weapon or a bulge in Appellant's t-shirt or jeans (Tr. 22).

Officer Reynolds was in the area investigating only general complaints about robberies (Tr. 3, 22). Officer Reynolds never had heard any complaints about Appellant or the corner where he was standing (Tr. 3, 22). Despite ordering

Appellant out of the store and making him put his hands against the store wall, the trial court refused to find the search and seizure illegal (Tr. 19).

The Fourth Amendment of the United States Constitution and Article I, Section 15 of the Missouri Constitution prohibit unreasonable searches and seizures. State v. Jackson, 186 S.W.3d 873, 879 (Mo. App. W.D. 2006). A search conducted without a warrant is presumptively invalid unless it falls within certain recognized exceptions. Id.

The United States Supreme Court has held that the Fourth Amendment is not offended when a law enforcement officer briefly stops a person if the officer has a reasonable suspicion, based on specific and articulable facts, that the person is involved in criminal activity. Terry v. Ohio, 392 U.S. 1, 20 (1968). In determining whether a seizure and search were unreasonable, this Court must determine "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 20. To be reasonable, the suspicion must be more than an "inchoate and unparticularized suspicion or 'hunch.'" Terry, 392 U.S. at 21.

This police-citizen encounter was clearly an investigatory stop and not a voluntary police encounter. Terry, 392 U.S. at 19. "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." United States v. Cortez, 449 U.S. 411, 417 (1981). Appellant was seized when the uniformed officer came in the store and

ordered Appellant to exit the store and put his hands in the air against the wall (Tr. 5-6, 23). The appropriate inquiry is whether a reasonable person would "refuse to cooperate" or "simply walk away" from this intimidating situation. United States v. Mendenhall, 446 U.S. 544, 554 (1980). "[F]reedom to leave means fundamentally the freedom to break off contact." United States v. Wilson, 953 F.2d 116, 123 (4th Cir. 1991). "It is well established that law enforcement officers need not physically restrain citizens in order for courts to determine that a stop has occurred; rather, a "show of authority" . . . is sufficient to effectuate a stop unless 'a reasonable person would feel free to disregard the police and go about his business.'" State v. Roark, 229 S.W.3d 216, 220 (Mo. App. W.D. 2007), citing Florida v. Bostick, 501 U.S. 429, 434 (1991) and California v. Hodari, 499 U.S. 621, 628 (1991).

In evaluating a citizen's encounter with the police, "a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." Bostick, 501 U.S. at 439-40. "[T]he test must not be what the defendant himself . . . thought, but what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes." Gomez v. Turner, 672 F.2d 134, 140 (D.C. Cir. 1982) (citing Coates v. United States, 413 F.2d 371, 373 (D.C. Cir. 1969)). The determination may involve "a number of factors including, but not limited to, the number of officers present, the degree to which they emphasized their

authority, whether weapons were displayed, whether the person was already in custody, whether there was any fraud on the part of the officers, and the evidence of what was said and done by the person consenting." State v. Taylor, 917 S.W.2d 222, 224 (Mo. App. W.D. 1996).

Under these circumstances, a reasonable person in Appellant's position would not feel free to walk away since it would be clear to any reasonable person that Officer Reynolds was ordering Appellant to do something and that compliance was not optional. Hodari, 499 U.S. at 628. Ordering Appellant to do something was a "show of authority "that constitutes a detention." Terry, 392 U.S. at 19 n.16. "[W]hat constitutes a restraint on liberty prompting a person to conclude that he is not free to leave will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (internal quotation omitted).

The case of State v. Gabbert, 213 S.W.3d 713 (Mo. App. W.D. 2007), is akin to Appellant's case. In Gabbert, the defendant was approached in the back yard of a house and ordered to remove his hands from his pockets; he placed his hands on the wall behind him; the officer started searching his person, and seized a knife. Id. The Court of Appeals held that: (1) defendant had standing to object to the search and seizure of his person; (2) the totality of the circumstances indicated that defendant was seized; (3) the stop of defendant constituted an unlawful seizure; and, (4) even assuming that defendant voluntarily consented to

the search of his person, the State failed to show that the search was sufficiently independent from the illegal stop to purge the taint of that illegality. Id.

Officer Reynolds' stop in this case constituted an illegal seizure. Similar to Gabbert, Appellant was approached by a uniformed officer who ordered him to leave the store and place his hands on the wall (Tr. 5, 23). Thus, Officer Reynolds' orders indicated to Appellant that compliance with her request was mandatory. Gabbert, 213 S.W.3d at 719) (holding that an arresting officer's immediate order to remove hands from pockets constituted a seizure). The totality of the circumstances indicate that Appellant was seized.

In United States v. Jones, 606 F.3d 964 (8th Cir. 2010), a police officer was on routine patrol in a high crime area when he saw the defendant walking across a church parking lot wearing a long-sleeved hooded sweatshirt and "clutching the front area of his hoodie pocket with his right hand." Id. at 965. The defendant watched the marked police car drive by and continued to walk across the parking lot, clutching his sweatshirt pocket. Id. The police officer decided to stop and frisk the defendant because he was trained to look for clues that an individual is carrying a firearm and the defendant's action of clutching his sweatshirt against his body aroused his suspicion. Id. The defendant stopped walking when the police cruiser approached him. Id. The police officer exited the vehicle, told the defendant to place his hands behind his back, and conducted a pat down search for weapons. Id. The search uncovered a 9-millimeter handgun and a loaded magazine clip. Id. The defendant moved to suppress the seized firearm and

ammunition, arguing the police officer lacked reasonable suspicion to stop and frisk him. Id. The district court granted the motion. Id. The government filed an interlocutory appeal, which was affirmed by the Eighth Circuit. Id.

Appellant acknowledges the holding in Jones is not binding on this Court, but is persuasive given its similar facts and legal analysis. As in Jones, Officer Reynolds was on routine patrol in a high crime area and made eye contact with Appellant, while observing him engaging in innocent activity, pulling up his pants from behind (Tr. 3, 23). Like the officer in Jones, Officer Reynolds testified about her past experience, stating, "In the past of every weapons arrest I've been assisting or been on, a lot of individuals that carry weapons happen to adjust the weapon for some reason when the police come. I don't know if it's a subconscious thing they check it. So I believe the way he adjusted his pants was not in a manner to pull his pants up, as if he was checking to see if a weapon or the item that he had was still there (Tr. 4)." As in Jones, Officer Reynolds did not see any bulge or shape of a gun before searching Appellant, she had no knowledge of Appellant engaging in any criminal activity, and there was no immediate crime reported in the area (Tr. 13, 22-23). Furthermore, she acknowledged she had been on the police force only two years and conceded Appellant could have been merely pulling up his pants at the time she observed him (Tr. 7-8, 10).

The trial court erred in finding that Appellant's behavior upon seeing the officer was suspicious (Tr. 19). There was no evidence providing a basis for an "articulable suspicion" or "individualized suspicion" in Appellant's case and the

officer did not observe any unusual conduct which might have led her reasonably to conclude in light of her experience that criminal activity was afoot. See State v. Mack, 66 S.W.3d 706, 709 (Mo. banc 2002).

Officer Reynolds must reasonably believe that Appellant is guilty of carrying a weapon. Despite not seeing a gun or bulge, Officer Reynolds testified she believed that Appellant had a weapon (Tr. 23). Officer Reynolds admitted that touching one's side alone or pulling one's pants up is not suspicious or illegal (Tr. 10). Officer Reynolds never testified that Appellant clutched his side as if to be clutching a weapon (Tr. 3, 23).

In Illinois v. Wardlow, 528 U.S. 119, 125 (2000), the Supreme Court stated Terry recognized that officers could detain individuals to resolve the ambiguity. The difference between Wardlow and Appellant's case is that Appellant's action was not ambiguous. In Wardlow, the individuals were pacing back and forth in front of a store, peering into the window, and periodically conferring, which, by itself, was lawful, but suggested that the individuals were casing the store for a planned robbery. Id. Appellant did nothing suspicious like pacing, peering into a window or conferring with someone else.

Further, Appellant's making eye contact with Officer Reynolds was not grounds for reasonable suspicion (Tr. 3). Moreover, Appellant did not try to avoid Officer Reynolds. See e.g. State v. Manley, 115 S.W.3d 398, 403 (Mo. App. S.D. 2003) (finding no reasonable suspicion based on the officer's belief that the defendant was trying to avoid him); see also State v. Schmutz, 100 S.W.3d 876,

880 (Mo. App. S.D. 2003) (holding police officer lacked reasonable suspicion to conduct Terry stop of a defendant who had left shopping center parking lot in his truck late at night in a "hurry").

As a matter of law, the State's evidence did not establish that Officer Reynolds had an objectively reasonable suspicion to stop Appellant. Because Officer Reynolds violated Appellant's Fourth Amendment protection from illegal searches and seizures, all evidence obtained and testimony adduced as a result of the stop should have been suppressed by the trial court as "fruit of the poisonous tree." See State v. Weddle, 18 S.W.3d 389 (Mo. App. E.D. 2000). Without the seized weapon, cartridge, ammunition, and marijuana, and Officer Reynolds' testimony relating to the seizure of the said evidence, there is insufficient evidence to support the conviction.

This Court must find this error was not harmless and follow the rule from Fahy v. Connecticut, 375 U.S. 85 (1963). In Fahy, the defendant waived trial by jury and was convicted of willfully injuring a public building by painting swastikas on a synagogue. 375 U.S. at 85-86. At his trial, a can of paint and a paint brush were admitted in evidence over his objection. Id. at 87.

On appeal, the Connecticut Supreme Court held that the paint and brush had been obtained by means of an illegal search and seizure, and that, therefore, the trial court erred in admitting them in evidence, but that their admission was a harmless error, and it affirmed the conviction. Id. The United States Supreme Court held that the erroneous admission of this illegally obtained evidence was

prejudicial to the defendant, it could not be called harmless error, and the conviction is reversed. Id.

In Fahy, the United States Supreme Court's test was whether there is a *reasonable possibility* that the evidence complained of might have contributed to the conviction. Id. at 86-87 (emphasis added). To decide this question in Fahy, the Court had to review the facts of the case and the evidence adduced at trial. Id. at 87.

Specifically, the Court found the tangible evidence of the paint and brush was, itself, incriminating. Id. at 88. In addition, the paint and brush were used to corroborate an officer's testimony as to the presence of the defendant near the scene of the crime at about the time it was committed. Id. Further, the illegally seized evidence was used as the basis of opinion testimony to the effect that the paint and brush matched the markings on the synagogue. Id. Other incriminating evidence admitted at trial concerned the defendant's admissions made when he was arrested and a full confession made at the police station later. Id. at 89.

The United Supreme Court stated that it could not ignore the cumulative, prejudicial effect of this evidence upon the conduct of the defense at trial. Id. at 91. The Court further stated it was only after admission of the paint and brush, their subsequent use to corroborate other state's evidence, and introduction of the confession that the defendants took the stand, admitted their acts, and tried to establish that the nature of those acts was not within the scope of the felony statute under which the defendants had been charged. Id. The Court found it was clear

that the erroneous admission of this illegally obtained evidence was prejudicial to the defendant and could not be called harmless error. Id. at 91-92.

This Court should not apply the harmless error standard stated in Motes v. United States, 178 U.S. 458 (1900). In Motes, erroneously admitted evidence was harmless error if the defendant testified about the evidence at trial. 178 U.S. at 475-476. In Motes, the defendant was convicted for conspiracy accompanied by murder. 178 U.S. 460-461. The trial court erroneously allowed a co-defendant's prior court testimony against the accused given at an examining trial that was in the nature of a preliminary hearing. Id. at 471. However, the United States Supreme Court did not reverse and remand for a new trial because Motes testified and admitted to the murder at his trial. Id. at 475-476.

As in Fahy, this Court should not apply the Motes harmless error test to Appellant's case. Applying the Fahy test to Appellant's case, there is reasonable possibility that the illegally seized weapon, cartridge, ammunition, and marijuana, and Officer Reynolds' testimony relating to the seizure of the said evidence contributed to Appellant's convictions. Without the seized evidence and Officer Reynolds' testimony relating to the seizure of the evidence, the State would not have had a case against Appellant.

In Missouri, the Sixth Amendment confrontation case, Motes, has been improperly extended to Fourth Amendment search and seizure cases. See State v. Pate, 859 S.W.2d 867, 870-871 (Mo. App. S.D. 1993); State v. Davalos, 128 S.W.3d 143, 149 (Mo. App. S.D. 2004). In Pate, the Southern District relied on

Motes in holding the admission of evidence obtained during unlawful stop of defendant was harmless error when no reasonable doubt exists that the admitted evidence did not contribute to the verdict obtained. Specifically, in Pate, the Southern District found the trial court erred in failing to suppress the defendant's marijuana and statements to the officers, but also found that their subsequent receipt into evidence as part of the State's case was harmless error beyond a reasonable doubt because the defendant voluntarily testified in his own behalf and his testimony amounted to a confession. 859 S.W.2d at 870.

In Davalos, the Southern District held if evidence was illegally seized, any error was harmless based on the defendant's confession relying on Motes and Pate. 128 S.W.3d at 149. But the Davalos opinion stated, "[a]lthough we note that the Motes case was decided in 1900, prior to Terry and its progeny, at this point if Pate is not to be followed, we believe it is the Missouri Supreme Court that must make that decision." Id.

As in Pate, Appellant stated under oath at trial that he possessed the seized evidence found after the search. If this Court applies Pate, Appellant's testimony on cross-examination would prevent this Court from providing Appellant any claim of relief on his point of error. Even though it may seem like a small difference, in Pate, the defendant made a written statement before trial admitting to the crimes. 859 S.W.2d at 870. In Appellant's case, he never made any statements about the weapon, cartridge, ammunition, and marijuana until he exercised his right to testify at trial.

There is a real tension in this case between Appellant's Fourth Amendment right against unlawful search and seizure and his Fifth Amendment right against self-incrimination. This was not specifically addressed in Fahy. In this case, Appellant never made statements or a confession before his trial testimony (Tr. 2-19). During the pre-trial motion to suppress hearing, Appellant did not testify (Tr. 2-19). He only testified at his trial after the trial court failed to suppress his pre-trial motion and his motion for acquittal at the close of the State's evidence was denied (Tr. 19). After the trial court's failures, Appellant only had two options: tell the truth or perjure himself about the weapon, cartridge, ammunition, and marijuana. Appellant had to admit to having the seized evidence during cross-examination (Tr. 43).

It has long been recognized that improperly seized and admitted evidence is grounds for a new trial unless the error is harmless without question. State v. Richards, 67 S.W.2d 58, 61 (1933); State v. Riley, 704 S.W.2d 691, 694 (Mo. App. E.D. 1986) ("Where an erroneous ruling on a motion to suppress physical evidence is found to be prejudicial, the case is ordinarily reversed and remanded for a new trial."). The State bears the burden of showing the error to be harmless. State v. Anderson, 76 S.W.3d 275, 278 (Mo. banc 2002). (Wolff, concurring in part, dissenting in part). The Eastern District has held that admission of improper evidence is "harmless if (a) the other evidence of guilt is overwhelming or (b) the improper evidence is not highlighted *and* cumulative of other evidence." (emphasis in original). State v. Duncan, 27 S.W.3d 486, 488 (Mo. App. E.D.

2000) (Ordering a new trial where trial court improperly admitted results of portable breath test).

Based on Appellant's facts, the improper seized evidence is not harmless error. In Appellant's case, there is no doubt that the illegally seized weapon, cartridge, ammunition, and marijuana, and Officer Reynolds' testimony relating to the seizure of the said evidence contributed to Appellant's convictions.

This Court should be acutely cognizant that no category of cases draws the line so clearly between the possibility of restricting law enforcement and the possibility of evils arising from unrestricted law enforcement as do cases involving search and seizure. See Kansas City v. Butters 507 S.W.2d 49, 55 (Mo. App. 1974). Be that as it may, the courts have no right to defer determination of the applicability of the Fourth Amendment until after an accused's innocence or guilt has been determined. Id. Resolution of controlling applicability of the Fourth Amendment is apart from resolution of an accused's innocence or guilt. Id.

The fact that Appellant possessed the weapon, cartridge, ammunition, and marijuana in question is irrelevant in a Fourth Amendment context. The question is whether police conduct was such that all evidence of it should be suppressed. In Appellant's case, the seized evidence and Officer Reynolds' testimony must be suppressed because there is no doubt that the evidence and testimony complained of contributed to Appellant's convictions. Thus, Appellant respectfully requests that this Court reverse his convictions and direct that Appellant be discharged from these sentences. Rule 30.22.

## Conclusion

WHEREFORE, based on his argument in Point I of his brief, Appellant requests that this Court reverse his convictions and discharge him these convictions and sentences.

Respectfully submitted,

/s/ Timothy Forneris
Timothy Forneris, MO Bar #53796
Attorney for Appellant
1010 Market Street, Suite 1100
St. Louis, MO 63101
Phone: (314) 340-7662
Fax: (314) 340-7685
Tim.Forneris@mspd.mo.gov

## Certificate of Service and Compliance

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this 20th day of March, 2012, a true and correct copy of the foregoing brief served via the efiling system to the Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65101. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed the greater of 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains 4,950 words. Finally, I hereby certify that the electronic copies of this brief have been scanned for viruses and found virus-free.

/s/ Timothy Forneris
Timothy Forneris, MO Bar #53796
Attorney for Appellant
1010 Market Street, Suite 1100
St. Louis, MO 63101
Phone: (314) 340-7662
Fax: (314) 340-7685
Tim.Forneris@mspd.mo.gov